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February 26, 2007

Public Utilities Commission of Ohio
Docketing Division, 13th Floor
180 East Broad Street
Columbus, Ohio 43215-3793

RE: In the Matter of the Complaint of Duke Energy Ohio, Inc. v. The City of Forest Park
Case No. 05-0075-EL-PWC

Dear Sir or Madam:

Enclosed are one (1) original and ten (10) copies of *The City of Forest Park's Memorandum Contra Duke Energy Ohio, Inc.'s Application for Rehearing* to be filed in connection with the above-referenced matter.

Please return one date-stamped copy of the pleadings with the courier. Thank you for your assistance and if you have any questions, please do not hesitate to give me a call.

Very truly yours,

Daniel M. Anderson

DMA:slh
Enclosure

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Duke Energy Ohio,	:	
	:	**Case No. 05-75-EL-PWC**
Complainant,	:	
v.	:	
The City of Forest Park,	:	
Respondent.	:	

FOREST PARK'S MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S APPLICATION FOR REHEARING

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The City of Forest Park

Proving that they are unwilling to comport with the clear requirements on O.R.C. 4939, Duke Energy Ohio, Inc. ("Duke") continues in its Quixotic quest to overturn the City of Forest Park's Right-of-Way Ordinance and associated fees.[1]

Nobody is well-served by Duke's relentless and intransigent attitude here. Duke's actions serve only to impose further costs upon itself, the other providers who provide service in Forest Park, and, of course, the City.

Duke raises two arguments in its application for rehearing. First, Duke reiterates its arguments against the per-mile fee, ignoring four years of PUCO precedent that leads ineluctably down this path. Duke's second argument is that the issues of degradation and mapping are somehow ripe for review. Not only was the Commission absolutely correct in its ruling on ripeness, as the City pointed out in its Motion to Dismiss, but Duke's ripeness argument is barred under the doctrine of collateral estoppel. Because the latter issue is the simpler of the two, it will be addressed first.[2]

I. Duke's Mapping and Degradation Arguments Must Be Rejected

A. Duke Is Barred By Collateral Estoppel

Duke's arguments about the mapping and degradation fees were rejected by the Commission when Forest Park's 2004 Ordinance was before the Commission. In dismissing Duke's First Complaint, the Commission found that Duke's challenge was not yet ripe. This

[1] Although the motion was filed February 9, and the certificate of service represents it was mailed February 9, the postmark on the City's service copy of the motion was dated February 12. Contrary to the Attorney Examiner's previous instruction to the parties to provide electronic service, Duke failed to do so. This failure to follow basic procedural requirements would alone justify denial of Duke's application.

[2] As in previous briefs, Forest Park will cite extensively to the decisions rendered by the Commission in the 2003 cases involving the cities of Toledo and Dayton: *WorldCom, Inc. et al. v. Toledo*, Case No. 02-3207-AU-PWC and Case No. 02-3210-EL-PWC ("*Toledo*"); *WorldCom, et al. v. City of Dayton,* Case No. 03-324-AU-PWC ("*Dayton*"). These two cases resulted in 5 different decisions. The decisions in *Toledo* were an Entry on Toledo's Motion to Dismiss, entered March 4, 2003 ("*Toledo I*"); the Opinion and Order filed May 14, 2003 ("*Toledo II*") and the Entry on Rehearing filed July 1, 2003 ("*Toledo III*"). The *Dayton* decisions were an Opinion and Order filed June 26, 2003 ("*Dayton I*") and an Entry on Rehearing, filed August 19, 2003 ("*Dayton II*").

included Duke's challenges to the provisions in the Ordinance related to fees for mapping and degradation. *March 7, 2006 Entry*, p. 7-9, 12. ("*Forest Park I*") Duke did not seek rehearing, nor did it appeal to the Supreme Court. Duke is therefore bound by this determination under principles of collateral estoppel.

In *Office of Consumers' Counsel v. PUCO* (1985), 16 Ohio St. 3d 9, 10 the Supreme Court held that res judicata and collateral estoppel apply in administrative proceedings. Collateral estoppel operates to bar relitigation of an issue of fact or law that was at issue in a former case between the same parties that was passed upon by a tribunal of competent jurisdiction. There is no question that all the tests are satisfied. The parties are the same (Complainant's name has changed, but that is inconsequential)[3], the issues of ripeness were before the Commission, and were ruled upon in Forest Park's favor in the March 7, 2006 Entry. The portions of the Ordinance relating to pavement degradation and mapping fees are completely unchanged from the version addressed by *Forest Park I.*[4] The conclusion is inescapable that Duke is collaterally estopped from asserting that mapping and pavement degradation "fees" are ripe for review here.

B. The Commission Properly Found That Forest Park Is Not Charging Fees For Mapping or Pavement Degradation, Making Duke's Arguments Unripe

On the merits, Duke fares no better. The unequivocal testimony is that Forest Park has not included any component related to either street degradation or mapping in any of its fees. Duke is not in any way literally or practically "subject to" fees either for degradation or for mapping. As such, there is no real issue before the Commission for determination.

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[3] See Duke's Post Hearing Merit Brief, filed Aug. 21, 2006, p. 2, n. 1 (acknowledging that Duke Energy Ohio, Inc. is the new name for CG&E).

[4] The only sections of the Forest Park Code that changed in the so-called Second Ordinance were Section 156.14 (not even part of the Right-of-Way Code) and Section 52.06(A) was changed to bring the Application Fee methodology in line with *Forest Park I.*

It is readily apparent that Duke does not like the language in the Ordinance that relates to pavement degradation and reduction in useful life. However, this Commission does not have jurisdiction over the language in Forest Park's ordinances. It has jurisdiction over the public way fees imposed upon utilities such as Duke. The Commission has determined, based upon the evidence before it, that no fees for degradation or mapping are ripe for review. No other conclusion is possible.

1. Pavement Degradation and Reduction in Useful Life.

Duke ignores reality by parsing Ordinance language in a manner that is completely out of context in an attempt to argue that the issue of pavement degradation or reduction in useful life is nonetheless ripe for review. Duke expresses concern that Forest Park could evade the review process of Chapter 4939 by establishing degradation fees in a city regulation or rule and not be required to enact fees following PUCO notice and formal city legislation. In an effect to argue its position, Duke points to Section 52.091(B)(3) of Forest Park's City Code[5], which authorizes the Public Works Director to adopt rules and regulations.

There are at least two reasons why this argument fails. First and foremost, the City has committed in this proceeding that it agrees that Duke will have the right to challenge degradation (and mapping) fees within 30 days of the imposition of such fees. The City would be bound by its agreement (which was adopted by the Commission in its Order). Second, Duke's notion that Forest Park can somehow avoid the notice and appeal requirements of Chapter 4939 simply by enacting fees in a regulation, rather than by ordinance misses the mark. Although Section 4939.06(A) refers to an "ordinance," it defies credibility to say that the wording of that section means that only fees established by ordinance are subject to Commission review. If that were

[5] This citation appears to be inconsistent with the Ordinance as attached to the Complaint. The numbering discrepancy appears to be the result of changes made by the codifiers. The provision in the Official Ordinance is 52.11.

true, Forest Park could have avoided this entire proceeding simply by rescinding Chapter 52 of its Code and having its Director of Public Works reenact all of its provisions by regulation. Forest Park is confident that the Commission would not countenance such transparent attempts to avoid review and it is absurd that Duke would reply upon them.

Similarly, Duke's notion that Chapter 4939 only allows it to challenge public way fees within 30 days of it first becoming subject to any public way fee makes no sense whatsoever. In this regard, the most natural reading of "first becomes subject to the ordinance" in Section 4939.06(A) is not exclusively the original effective date of an ordinance establishing public way regulation or fees in general, but the effective date of the portions of an ordinance or regulation establishing (or subsequently increasing) the specific public way fee that is being challenged. If Duke is correct, Ohio's cities could simply enact a uniform $1 per year public way fee for each utility, defend it against any challenges as a *de minimis* fee, and then "amend" the fee to charge much greater sums once the time to challenge had passed. Under Duke's interpretation, cities would be free to do so and the affected utilities would have no recourse. Such a result is demonstrably at odds with the intent of Chapter 4939 (and more importantly, its explicit language). The Commission has already held that amendments to public way fees give rise to a new right to challenge the amended fees. *See Dayton I*, p. 27 (holding that if Dayton changed its fees or allocation methods, such changes would be subject to a new right to appeal).

As Forest Park has repeatedly stated, **there are no costs included as a component of any of its public way fees that relate to degradation or reduction in the useful life of its streets**. Forest Park will readily concede and stipulate that, should it ever seek to change this fact and seek to recoup costs of degradation and/or reduction in the useful life, such a change would be subject to the notice requirements of Revised Code Section 4393.05(E) and would give

rise to a new right to bring an appeal by Duke or any other provider in Forest Park. Forest Park has faithfully maintained this position and Duke has continually been assured of it. Indeed, the Commission has so ruled. Second Opinion and Order, p. 11 (holding that notice and appeal provisions would apply if Forest Park imposed degradation fees).

As noted in Forest Park's Reply Brief, Duke's argument on degradation confuses the issue. Duke posits that, because Forest Park requires that the public way be restored to a condition at least as good as it was prior to construction, there is simply no way that degradation can take place. (Duke Merit Brief, p.24). Duke also posits that street repairs can easily be allocated to a particular user. (*Id.*, p. 25). But whether or not the road surface is restored to its same condition, so that the road remains usable, does not answer the question of whether the road will last as long, be as durable and/or remain as stable as it would if no one were cutting into it. The Ordinance already provides mechanisms to allocate costs to those whose repairs fail or to those who fail to make repairs. [6] Degradation is an entirely different issue, and addresses the question of whether even properly-repaired street cuts can cause a reduction in the useful life of a street and the deterioration of the surface and substrate of the right-of-way. In any event, the entire issue is for another day.

It appears that what Duke desires is to have the PUCO order the language in the Ordinance to be modified to exclude any references to "degradation and reduction in useful life." Duke's objection to the language of Forest Park's Ordinance is made clear at p. 18 of its brief: "It is unreasonable and unlawful for this Commission to permit any municipality to include the ability to assess such fees within an Ordinance absent actual knowledge of the nature of such costs." But Duke's argument asks this Commission to overreach its authority. The Commission

[6] Although Duke attempts to portray itself as adhering to the highest standard in the area of repairs, the fact is that Mr. Hebbler was forced to admit that Duke had left restoration projects uncompleted for seven months. (Tr., p. 35-36).

has no statutory authority to order Forest Park to alter the language in its Ordinance. The Commission's authority is limited to determining whether Forest Park's public way fees satisfy Chapter 4939. On the basis of the evidence before it, the Commission found that there are no degradation fees, and that any attempt to impose such fees would be subject to the notice and appeal provisions of Chapter 4939. Forest Park has not challenged this ruling.

2. Mapping

As Mr. Buesking testified, Forest Park currently accepts paper maps from the providers operating in the City. While the Ordinance gives the City the ability to require submission of mapping data in an electronic format, or to charge for staff time inputting data from paper maps into such an electronic system, neither of these events has occurred. Forest Park will agree that should it ever charge Duke a fee for the City's costs directly related to inputting mapping data into an electronic GIS system, Duke would have the right to challenge that fee.[7] As no fee is being charged now, the issue is not ripe.

To the extent that Duke is challenging the City's mapping requirements as burdensome or unnecessary, the Commission lacks jurisdiction over those issues. While R.C. 4939.06 gives the Commission jurisdiction over Public Way fees, nothing in Chapter 4939 gives the Commission jurisdiction over the City's regulatory decisions that involve regulating control and the management and operation of its Public Ways. Those decisions lie at the heart of Forest Park's paramount authority under the Home Rule Clause of the Ohio Constitution. The Commission has repeatedly recognized that challenges to a City's regulatory decisions are outside its jurisdiction. *See Toledo I*, p. 13, 35-36. In *Toledo I*, the Commission recognized that its jurisdiction was limited to matters "related to the amount of a public way fee, related

[7] The methodology for such a fee (based upon the time spent by City personnel and the fully-loaded rates of those personnel) identical to that proposed by Dayton on rehearing, and which the Commission noted were "appropriate" and "laudable." *Dayton II*, p. 5, ¶11.

classification of users or occupants, or the assignment or allocation of costs to the fee." *Id.* Moreover, the costs of compliance with regulatory provisions of a public way ordinance do not equate to a public way fee over which this Commission has jurisdiction. *Id.*

Under the Ordinance, all providers with facilities located in Forest Park must submit mapping information within a year of applying for a Certificate of Registration. F.P. Code §52.07. The Ordinance specifically preserves a provider's ability to submit that information on a paper map. If the City employs an electronic mapping system, the provider may submit information electronically, or pay the City's actual costs of converting the paper map information to the electronic format. Mr. Buesking testified that currently the City has no such system and accepts paper maps.

Given that the City currently accepts paper maps and has no present intention to implement a GIS system that might result in a fee to Duke, the Commission properly found the issue unripe. In the event that Forest Park does implement a GIS system, and in the event that it chooses a system that is incompatible with what Duke can provide, then Forest Park might decide to assess the actual and direct costs of inputting Duke's mapping information into the City's then current system. At the time, a challenge would be appropriate because there would be a dispute with concrete facts. Until then, the entire dispute is merely hypothetical.

To the extent that the Commission is inclined to grant rehearing on the mapping fee issue, it should affirm and uphold its prior decision. The provisions of the Ordinance that provide for invoicing providers for the costs Forest Park would incur to convert paper information to electronic form is exactly what the Commission approved in *Dayton. See Dayton II,* p. 5. ("Although not areas where Dayton has requested guidance, the Commission would also note that Dayton's plan to bill directly for the costs of inputting GIS data is appropriate . . . "). Duke

has presented no evidence whatsoever that direct billing for actual costs incurred violates any provision of Chapter 4939. If it ever came to pass, the costs involved would be the staff time required to convert information from paper to electronic format. As such, Duke's notion that the costs are not "real expenses" based upon "amounts paid" (Duke Br., p. 30) is wrong. Again, the recovery of these types of costs was already found to be "reasonable" in *Dayton II*.

As a final note, Duke's argument on mapping fees is truly ironic. With respect to the Registration Maintenance Fee, Duke complains it is not precise enough. Yet when confronted with a fee that would be based upon direct billing of actual costs, Duke complains that there is no way for it to know in advance what the fees are. The inevitable conclusion must then be that Duke doesn't think any fees would ever be appropriate. That, of course, is contrary to the spirit, intent and actual language of Chapter 4939 and the Home Rule Clause of the Ohio Constitution. *See Dublin v. State* (Franklin C.C.P. 2002), 118 Ohio Mis.2d 1 (holding that right to recover costs imposed on city by utilities' use of public ways is protected by the Home Rule Clause and the Ohio Constitution).

II. Forest Park's Mileage-Based Fee For Allocating Administrative Costs Is Supported By The Language Of Chapter 4939, Commission Precedent, And Common Sense

With respect to the per-mile fee, Duke attempts just as it did before to confuse the issue. Duke hypothesizes that operators of "mature" systems impose less cost because they create fewer disturbances and less activity than a newer occupant currently building out its system. But the costs relating to such right-of-way activity are not recovered through the per-mile Registration Maintenance Fee. Instead, those costs are recovered via the Right-of-Way Permit Fee, which is imposed upon each project in the right-of-way. Since those fees can be attributed to a specific project, they are recovered from that provider performing a project. The Registration Maintenance Fee is designed to recover administrative costs (such as legal costs)

and other costs that are not capable of being attributed to a specific provider and project and bring recovered via the Right-of-Way Permit Fee.

Moreover, Duke's suggestion that the Commissions only statement of approval for a per-mile fee comes from the Entry on Rehearing in *Dayton* is simply wrong. The lynchpin of the decisions in *Toledo II* and *Dayton I* was that any mileage-based fee that included substantial disparities on a per-mile basis was prima facie unreasonable and not competitively neutral. *Toledo II*, p. 35-36, 51, *Dayton I,* p. 22-24. While this case may be the first to uphold a mileage-based fee, that is only because the mileage-based fees in *Toledo* and *Dayton* were struck down due to per-mile disparities. Implicit in those cases (made explicit in *Dayton II*) is that a mileage-based fee would be upheld if it did not create per-mile disparities.

The teaching of the *Toledo II* and *Dayton I* decisions, as confirmed by *Dayton II*, is that a mileage-based fee is an acceptable means to allocate administrative costs, so long as any fee results in uniform per-mile charges to the various participants. While the Commission did not rule out other allocation schemes, it held that any scheme resulting in per-mile disparities would have to be justified by significant evidence, or a showing of a better allocation scheme. Indeed, in *Dayton I*, the Commission held that any fee resulting in substantial disparities in per-mile charges would violate parts 5, 6, and 8 of the Ten-Part test, in that it would not be (a) competitively neutral, nor would it (b) treat similarly situated providers in a similar fashion. *Dayton I*, p. 22-24. The Commission held that evidence would be required to substantiate any per-mile diminution in costs in order to justify charging larger providers a lower per-mile fee. No such evidence is before the Commission in this case.

The only "evidence" Duke can point to that supports its contention about cost allocation is its theorizing that new entrants would be subsidized. However, concerns about such subsidies

are what led the Commission to draw the distinction between one-time items (that are recovered via the per-project Right of Way Permit Fee) and recurring or ongoing costs (that are recovered via a mileage-based fee). *See Dayton I*, p. 20-24. Addressing that concern, Forest Park has separated cost recovery based upon activities in the public way (which costs are recovered via the per-project Right of Way Permit Fee) and recovery of administrative costs, such as legal fees (which costs are recovered via the mileage-based Certificate of Registration Maintenance Fee).

A fee based upon amount of activity is sensible for those fees related to activities in the public ways, and in fact, Forest Park has adopted this methodology in its Right-of-Way Permit Fee. But for those costs not allocated to specific permittees, there has to be some way to allocate those costs, and the fairest way to do so is based upon amount of mileage used. *See Toledo II,* p. 51:

> "Therefore, this category of cost [legal fees] would, in general, be recoverable as a public way fee. It would be reasonable to share such costs among all users of the public way. Allocation of such costs on the basis of mileage occupied would be reasonable.

In short, the Commission has consistently held, from the very first case brought before it under Chapter 4939, that a mileage-based allocation is an appropriate way to allocate administrative costs such as legal costs. Here, no evidence was presented that would support any other method, and the Commission properly upheld the mileage-based methodology here.

III. Forest Park's Allocation Methodology Is Supported By Commission Precedent and Common Sense

Duke misstates the burdens of proof when it argues that Forest Park was required to support its allocation methodology by clear and convincing evidence. (Motion, p. 14). As the Commission noted in its Second Opinion, the burden in a public way appeal is on the Respondent to show by clear and convincing evidence that those costs supporting its fees result

from use of the public way. Second Opinion, p. 6; *Toledo I*, p. 17-19. The Commission has never required that the allocation of costs among providers be "proven" through clear and convincing evidence. As for those issues, the burden of proof remains where it normally lies, on the complainant. *Toledo I*, p. 19. "The requirement for a clear demonstration by the municipality is only applicable to the proper allocation and assignment of costs to the occupancy or use of the public way. The burden of proof as to all other aspects of Section 4939.05(C), including the showing as to whether costs have actually been incurred, remains on the complainants." That the burden is on Duke to produce evidence showing that the allocation is unreasonable or not competitively neutral. Duke has failed to bring forward any such evidence.

While it is true that the decision in *Dayton II* was, as with any decision, based upon the facts before the Commission, there are no material differences between this case and *Dayton II*. There is nothing unique about the situation in Forest Park that would justify departing from existing methodologies. Duke's witnesses openly acknowledged that their opposition to the per-mile fee is not based upon any factual distinctions between Forest Park and Dayton. Mr. Wathen testified that he believed *Dayton II* was wrongly decided (July 14, 2006 Tr., p. 19), and that there was nothing factually that distinguished the two cases:

> ATTORNEY EXAMINER: One second, please. I have to follow that up. Leaving aside that you feel that Dayton was not properly decided and it should not be a Commission precedent in this case, do you think there is something about Forest Park's situation that distinguishes it from Dayton that makes it inappropriate, or do you believe that Dayton was wrongly decided?
>
> A. I think in both cases they are an inappropriate way to allocate costs.
>
> ATTORNEY EXAMINER: Is there anything to distinguish Dayton from Forest Park?
>
> A. No, not on this aspect of it, no. I just think the allocation method is not a fair way to allocate costs.

(July 14, 2006 Tr., p. 19-20). Duke's philosophical opposition aside, the reasons articulated by the Commission for rejecting a fee with a large per-mile disparity in *Toledo* and *Dayton* remain valid, and any such change could itself be challenged here by an adversely affected utility.

The point is that the costs recovered by the Registration Maintenance Fee are not caused by a specific provider's construction activity. These costs are caused by the fact that a utility, any utility, is using Forest Park's public ways. These costs must be allocated somehow, and the Commission has previously ruled that a mileage-based allocation is valid and appropriate under Chapter 4939.

In any event, the bulk of the administrative costs that Forest Park is looking to recover are the legal fees incurred to defend Duke's ill-conceived challenges. There is clearly no way to allocate these fees except on a per-mile basis (unless one were to allocate them in their entirety to Duke). It is also important to note that Forest Park, in keeping with the Commission's decision in *Dayton*, is only seeking to recover the legal costs raised by Duke's challenge over a reasonable amount of time. Dayton previously chose to recover its legal costs over a three year period. Here, Forest Park, in an act of unquestioned benevolence, is only attempting to recover such legal fees over a five year period, without any added amount for interest or carrying charges.

In every other public way case that has gone to hearing before the Commission, numerous parties have intervened. The *Toledo* and *Dayton* cases featured over a dozen parties each. The Commission heard all of those parties, and the rules of the road were developed. In this case, Duke standing alone, now tries to argue to the Commission that it did not mean what it said in the *Toledo* and *Dayton* cases, and that the Commission has therefore misapplied the very test that the Commission itself had formulated and adopted. The Commission has substantial

discretion when interpreting and applying a statute it is charged by the Legislature with implementing *Swallow v. Industrial Com'n of Ohio* (1988), 35 Ohio St. 3d 55, 56. There was no abuse of discretion here. The Commission properly interpreted and applied the Ten Part Test, and the *Toledo* and *Dayton* principles.

Forest Park has tirelessly and consistently followed the Commission's "rules of the road." In those areas where the Commission found Forest Park's cost tracking deficient, Forest Park is moving (or has already moved) to amend those procedures to satisfy the Commission's concerns. Duke, on the other hand, once again appears to hope that if it simply makes this proceeding too expensive, both economically and emotionally, Forest Park will just simply go away. Indeed, what Duke argues for is a process where any municipality seeking to enact a public way fee will essentially be thrown into an adversarial and litigious process that will become so protracted and expensive that a "chilling" effect will be created whereby no municipality would ever want to enact a public way ordinance or any test. The model developed to allocate administrative costs in *Toledo* and *Dayton* – a mileage based fee – is simple and straightforward and does not require expert testimony developed at great cost. Duke, alternately, would have the City obtain expert support for every thought its officials have. Such a requirement violates the Ten Part Test, Chapter 4939, and the Home Rule Clause of the Ohio Constitution.[8]

After two long years of Duke's tilting at windmills, it is finally time for this proceeding to come to an end.

[8] As noted in Forest Park's affirmative defenses, Forest Park believes that Chapter 4939 violates the Home Rule Clause of the Ohio Constitution. Because the Commission has previously ruled it lacks jurisdiction over constitutional challenges, Forest Park will not belabor the issue here, but reserves the right to advance such an argument should Duke appeal to the Supreme Court of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of February, 2007, a true and accurate copy of the foregoing was served by e-mail and first-class U.S. mail, postage prepaid, upon:

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